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The Merger Clause: A Potential Defense to the Mann Frankfort Implied Promise?

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THE MERGER CLAUSE: A POTENTIAL DEFENSE TO THE MANN FRANKFORT IMPLIED PROMISE?

By: Jay J. Madrid, David F. Johnson, & Joseph P. Regan¹

TABLE OF CONTENTS

I. INTRODUCTION.....	729
II. STANDARDS FOR ENFORCING COVENANTS NOT TO COMPETE	731
A. <i>Test for “Ancillary to or Part of an Otherwise Enforceable Agreement”</i>	731
B. <i>Timing of Consideration for the Otherwise Enforceable Agreement</i>	733
C. <i>Implied Promises Can Create an Otherwise Enforceable Agreement</i>	734
III. DEFENSES TO THE MANN FRANKFORT IMPLIED-PROMISE THEORY.....	736
A. <i>Employee Must Not Be Able to Do His Job Without the Use of Confidential Information</i>	736
B. <i>Merger Clause Can Bar Implied Promise</i>	737
C. <i>Public Policy Supports No Implied Promise Where Merger Clause Exists</i>	740
D. <i>The Public Policy of Freedom of Contract Supports the Enforcement of a Merger Clause in Derogation of an Implied Promise</i>	741
IV. CONCLUSION	742

I. INTRODUCTION

It is not difficult to imagine a case where a long time salesperson leaves her former employer and begins work with a new employer. When the salesperson began employment with her former employer, the former employer required the salesperson to sign an employment agreement. This agreement contained a covenant not to compete that stated that the salesperson would not compete with the former employer after he resigned. It also provided that she would not use the former employer’s confidential information. But the agreement did

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not provide any express promise that the former employer would ever give the salesperson any confidential information. Moreover, the agreement contained a merger clause that provided that the agreement was the only agreement between the parties and that there could be no implied promises by either party.

After the salesperson begins working for the new employer, she begins communicating with customers whom she contacted while previously employed with her former employer. The former employer files suit and attempts to enforce the covenant not to compete. The issue in this example is whether the covenant is enforceable: Is there an otherwise enforceable agreement regarding confidential information even though there was no express promise by the former employer to provide any confidential information?

Before one can delve into the morass of covenant-not-to-compete law, it is worth a moment to take a look at the “big picture” of employees leaving and competing against their former employers. In conformity with a person’s constitutional right to compete, Texas generally takes a strong stand against restraints of trade. For example, “Every contract, combination, or conspiracy in restraint of trade or commerce is unlawful.”² Historically, Texas courts would not enforce covenants not to compete, unless they were reasonable, because they were improper restraints of trade.³ The standard for reasonableness was very strict, and courts rarely enforced these covenants.⁴

Further, ex-employees generally have a right to compete for any and all customers. Generally, an employee has a right to work where he or she pleases and in the field that he or she chooses. The duties that the employee owes to his or her employer do not alter this fundamental right. An at-will employee may properly plan to compete with her employer and may take active steps to do so while still employed.⁵ The employee has no general duty to disclose her plans and may secretly join with other employees in the endeavor without violating any duty to the employer.⁶ Absent special circumstances, once an employee resigns, she may actively compete with her former employer.⁷

In Texas, to resign from one’s employment and go into business in competition with one’s former employer is, under ordinary circumstances, a constitutional right.⁸ There is nothing legally wrong in en-

2. See TEX. BUS. & COM. CODE ANN. § 15.05(a) (West 2011).

3. See *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168, 170 (Tex. 1987).

4. See *Markwardt v. Harrell*, 430 S.W.2d 1, 3 (Tex. Civ. App.—Eastland 1968, writ ref’d n.r.e.) (stating contracts not to compete are in restraint of trade and are not favorably regarded).

5. *Abetter Trucking Co. v. Arizpe*, 113 S.W.3d 503, 509 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

6. *Id.*

7. *Id.*

8. *Ledel v. Bill Hames Shows, Inc.*, 367 S.W.2d 182, 184 (Tex. Civ. App.—Fort Worth 1963, no writ).

gaging in such competition or in preparing to compete before the employment terminates.⁹ Moreover, the possibility of crippling, or even destroying, a competitor is inherent in a competitive market.¹⁰

Yet, covenants not to compete are certainly enforceable under the proper circumstances, and the Texas Supreme Court has recently stated that courts should not focus on enforceability so much as on the reasonableness of the restraints.¹¹ Ultimately, whether a covenant is enforceable depends entirely on the application of the Texas Covenants Not to Compete Act (the “Act”).¹² Texas Business and Commerce Code § 15.50(a) (“§ 15.50(a)”) provides:

A covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interests of the promisee.¹³

Under the Act, a threshold issue is whether a covenant not to compete is ancillary to an otherwise enforceable agreement.

II. STANDARDS FOR ENFORCING COVENANTS NOT TO COMPETE

A. *Test for “Ancillary to or Part of an Otherwise Enforceable Agreement”*

The Texas Supreme Court has issued a number of opinions describing the requirements for § 15.50(a).

In *Light v. Centel Cellular Co. of Texas*, the Texas Supreme Court held that § 15.50(a) required two elements: (1) an “otherwise enforceable agreement”; and (2) a covenant not to compete that is “ancillary to or part of” the agreement at the time the otherwise enforceable agreement was made.¹⁴ “Otherwise enforceable agreements can emanate from at-will employment so long as the consideration for any promise is not illusory.”¹⁵ The Court created a two-part test to address whether an agreement not to compete was “ancillary to an otherwise enforceable agreement” as required by the Act, stating: (1) the consideration given by the employer in the otherwise enforceable agreement must give rise to the employer’s interests in restraining the employee from competing; and (2) the covenant must be designed to enforce the employee’s consideration or return promise in the other-

9. See *M P I, Inc. v. Dupré*, 596 S.W.2d 251, 254 (Tex. Civ. App.—Fort Worth 1980, writ ref’d n.r.e.).

10. *Abetter Trucking*, 113 S.W.3d at 509.

11. See *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 777 (Tex. 2011).

12. See TEX. BUS. & COM. CODE ANN. § 15.50 (West 2011).

13. *Id.* § 15.50(a).

14. *Light v. Centel Cellular Co. of Tex.*, 883 S.W.2d 642, 644 (Tex. 1994).

15. *Id.* at 645.

wise enforceable agreement.¹⁶ One example of an enforceable non-illusory promise provided by the Court was an employer's promise to provide the employee confidential information.¹⁷ But, in the infamous footnote six, the Court stated that a promise to provide confidential information in the future would not support a covenant not to compete.¹⁸

Most recently, in *Marsh USA Inc. v. Cook*, the Court overruled *Light*'s "give rise" requirement in the first element of the "ancillary to an otherwise enforceable agreement" test.¹⁹ Marsh granted Cook the option of purchasing shares of stock via a plan that was developed to provide valuable employees an opportunity to become part owners of the company with the incentive to contribute to and benefit from the long-term growth of the company.²⁰ Cook later signed an agreement and notice form stating that he wanted to exercise the stock options to acquire the stock, which also provided that if he left the company within three years after exercising the options, he would not compete for a two year period.²¹ Less than three years later, he resigned and immediately began employment with a competitor.²² Marsh sued Cook to enforce the covenant, and the trial court granted Cook's motion for summary judgment holding that the covenant was not enforceable. The court of appeals affirmed holding that the award of stock options was mere compensation, which could not support a covenant not to compete. Specifically, the court of appeals held that the transfer of stock did not give rise to Marsh's interest in restraining Cook from competing.²³

The Texas Supreme Court reversed the lower courts. It held that under the statute, courts must engage in a two-step inquiry: (1) whether there is an "otherwise enforceable agreement"; and if so, (2) whether the covenant is "ancillary to or part of" that agreement.²⁴ In rejecting the *Light* opinion's "give rise" requirement, the Court stated:

Turning to the "give rise" question, the Legislature did not include a requirement in the Act that the consideration for the noncompete must give rise to the interest in restraining competition with the employer. Instead, the Legislature required a nexus—that the noncompete be "ancillary to" or "part of" the otherwise enforceable agreement between the parties. There is nothing in the statute indicating that "ancillary" or "part" should mean anything other

16. *Id.* at 647.

17. *Id.* at 647 n.14.

18. *Id.* at 645 n.6.

19. *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 773–75 (Tex. 2011).

20. *Id.* at 766.

21. *Id.* at 767.

22. *Id.*

23. *Id.* at 767–68.

24. *Id.* at 771 (quoting *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 849 (Tex. 2009)).

than their common definitions. “[A]ncillary means ‘supplementary’ and part means ‘one of several . . . units of which something is composed.’”

The statute requires that a covenant not to compete be ancillary to an otherwise enforceable agreement. The common meaning of those words control; the covenant not to compete must be ancillary to (supplementary) or part of (one of several units of which something is composed) an otherwise enforceable agreement.²⁵

The Court then pointed to evidence that having important employees with customer relationships to execute covenants not to compete was part of Marsh’s goodwill. The Court held: “Awarding to Cook stock options to purchase MMC stock at a discounted price provided a reasonable nexus between the noncompete and the company’s interest in protecting its goodwill The stock options are reasonably related to the protection of this business goodwill. Thus, this covenant not to compete is ancillary to an otherwise enforceable agreement.”²⁶ It concluded: “We hold that if the relationship between the otherwise enforceable agreement and the legitimate interest being protected is reasonable, the covenant is not void on that ground.”²⁷

B. *Timing of Consideration for the Otherwise Enforceable Agreement*

In *Alex Sheshunoff Management Services, L.P. v. Johnson*, the Court clarified *Light* and held that the employer did not have to actually provide the confidential information at the time of the promise.²⁸ The Court initially acknowledged that under its prior decision in *Light*, an at-will employee who signed a non-compete covenant was not bound by that agreement if, at the time the agreement was made, the employer had no corresponding enforceable obligation.²⁹

The Court acknowledged that the unfulfilled promise would be illusory at the time of the employment agreement. But the Court held that the requirement that there be an “otherwise enforceable agreement” could be satisfied by the employer actually performing its illusory promise to provide an employee with confidential information.³⁰ Once the information was transferred, the covenant was enforceable. In context, the Court held that if an employer relies upon a confidentiality agreement to be the “otherwise enforceable agreement” that will support a covenant not to compete, the employer does not have to simultaneously provide the confidential information at the time the

25. *Id.* at 775 (citation omitted) (quoting *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651, 664–65 (Tex. 2006)).

26. *Id.* at 777.

27. *Id.* at 778.

28. *Alex Sheshunoff Mgmt. Servs., L.P.*, 209 S.W.3d at 651.

29. *Id.*

30. *See id.*

covenant not to compete is signed.³¹ When the employer later gives the employee confidential information, “the employer’s consideration is provided by performance and becomes non-illusory at that point, and the agreement in issue is otherwise enforceable under the Act.”³² The Court overruled footnote six of the *Light* opinion and made *Light*’s strict timing of consideration element less strict.

C. Implied Promises Can Create an Otherwise Enforceable Agreement

Notwithstanding the test for “ancillary to or part of” an otherwise enforceable agreement and notwithstanding the timing of the consideration provided by the employer, there historically had to be an express promise to transfer such consideration from the employer to the employee to be an “otherwise enforceable agreement.” For example, in *Hardy v. Mann Frankfort Stein & Lipp Advisors, Inc.*, the covenant not to compete was contained in a limited partnership agreement, in which there was a promise not to use confidential information but no express promise to provide the same.³³ The court of appeals declared the covenant unenforceable because it was not supported by consideration:

We conclude that [the limited partnership, including its related entities as defined] gave no consideration to [the limited partners] because [the limited partnership] did not promise to disclose confidential information or to allow [the limited partners] to gain access to information. We also conclude that [the limited partners] did not promise not to disclose any confidential information, and thus the [covenant not to compete] was not “designed to enforce the employee’s consideration or return promise in the otherwise enforceable agreement.”³⁴

Thus, the covenant was struck down by the court as an unreasonable restraint of trade.

The Texas Supreme Court reversed *Mann Frankfort*, and addressed the issue of whether an *implied* promise to provide confidential information could be the basis of an otherwise enforceable agreement.³⁵ In *Mann Frankfort*, an accounting firm (“employer”) hired a tax accountant (“employee”) and required that the employee sign a standard at-will employment agreement.³⁶ The agreement contained a provision that required the employee to purchase the portion of business for which he performed services in the first year after termina-

31. *Id.*

32. *Id.*

33. *Hardy v. Mann Frankfort Stein & Lipp Advisors, Inc.*, 263 S.W.3d 232, 245–46 (Tex. App.—Houston [1st Dist.] 2007), *rev’d*, *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844 (Tex. 2009).

34. *Id.* at 245 (quoting *Alex Sheshunoff Mgmt. Servs., L.P.*, 209 S.W.3d at 649).

35. *Mann Frankfort*, 289 S.W.3d at 844.

36. *Id.* at 846.

2012] *THE MERGER CLAUSE: A POTENTIAL DEFENSE* 735

tion.³⁷ In the agreement, the employee also promised he would “not disclose or use at any time . . . any secret or confidential information or knowledge obtained by [employee] while employed”³⁸ The employee left the firm and filed suit for a declaration that the covenant was not enforceable. The trial court granted the employee’s motion for summary judgment on enforceability, and the court of appeals affirmed that decision.

The Texas Supreme Court reversed the lower courts. The Court first described its prior precedent regarding the enforcement of covenants not to compete since the Texas Legislature adopted Texas Business & Commerce Code § 15.50(a).³⁹ That provision states:

[A] covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.⁴⁰

The Court then turned to the issue of whether an implied promise to provide confidential information could be the basis of an “otherwise enforceable agreement.”⁴¹ The Court described the law regarding implied promises thusly: “[W]hen it is clear that performance expressly promised by one party is such that it cannot be accomplished until a second party has first performed, the law will deem the second party to have impliedly promised to perform the necessary action.”⁴²

In *Mann Frankfort*, the circumstances surrounding the employee’s employment indicated that it necessarily involved the transfer of confidential information by the employer before the employee could perform the work he was hired to do. The Court also noted that the employee could not have acted on his promise to refrain from disclosing confidential information unless the employer provided him with it. The employee’s promise to not disclose confidential information “meant nothing without a correlative commitment by the [employer] to provide that information.”⁴³ The Court concluded:

[The employer’s implied promise and its actual transfer of confidential information to the employee] satisfied the first requirement because the promise and provision of confidential information generated Mann Frankfort’s interest in preventing the disclosure of such information. In addition, Fielding’s promise not to disclose

37. *Id.*

38. *Id.*

39. *See id.* at 848–50.

40. *Id.* at 848 (citing TEX. BUS. & COMM. CODE ANN. § 15.50(a) (West 2011)).

41. *See id.* at 850.

42. *Id.* at 851.

43. *Id.*

any confidential information satisfied the second requirement because the client purchase provision was designed to hinder Fielding's ability to use the confidential information to compete against Mann Frankfort.⁴⁴

Therefore, the Court held that the client purchase provision was "ancillary to or part of" the otherwise enforceable agreement and was enforceable.⁴⁵ It is important to note that there was no discussion in *Mann Frankfort* about any agreement or contractual clause that forbid any implied promises; therefore, the Court could look to the common-law implied-promise theory.

III. DEFENSES TO THE *MANN FRANKFORT* IMPLIED-PROMISE THEORY

A. *Employee Must Not Be Able to Do His Job Without the Use of Confidential Information*

In finding an implied promise in *Mann Frankfort*, the Texas Supreme Court relied heavily on the fact that the employee, an accountant, could not have done his job without receiving confidential information.⁴⁶ Therefore, there is a strong argument that before there can be an implied promise, there must be evidence that, at the time the contract was entered into, the employee could not have done his job without confidential information.⁴⁷

In *Mann Frankfort*, an accounting firm ("employer") hired a tax accountant ("employee") and required him to sign an agreement promising that he would "not disclose or use at any time . . . any secret or confidential information or knowledge obtained by [employee] while employed"⁴⁸ Regarding the issue of whether an implied promise to provide confidential information could be the basis of an "otherwise enforceable agreement," the Texas Supreme Court held, under the facts of the case, it could.⁴⁹ The Court described the law regarding implied promises thusly: "[W]hen it is clear that performance expressly promised by one party is such that it cannot be accomplished until a second party has first performed, the law will deem the second party to have impliedly promised to perform the necessary action."⁵⁰ The circumstances surrounding the employee's employment indicated that it necessarily involved the transfer of confidential infor-

44. *Id.* at 852.

45. See *Gallagher Healthcare Ins. Servs. v. Vogelsang*, 312 S.W.3d 640, 646 (Tex. App.—Houston [1st Dist.] 2009, pet. denied); *York v. Hair Club For Men, L.L.C.*, No. 01-09-00024, 2009 WL 1840813, at *5 (Tex. App.—Houston [1st Dist.] June 25, 2009, pet. denied) (mem. op.).

46. *Mann Frankfort*, 289 S.W.3d at 851.

47. See *EMS USA, Inc. v. Shary*, 309 S.W.3d 653, 658–59 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

48. *Mann Frankfort*, 289 S.W.3d at 846.

49. *Id.* at 852.

50. *Id.* at 851.

mation by the employer before the employee could perform the work he was hired to do.

One court has described the implied-promise theory from *Mann Frankfort* as follows:

Under *Fielding*, an employer may impliedly promise to provide confidential information to an employee “if the nature of the employment for which the employee is hired will reasonably require the employer to provide confidential information to the employee to accomplish the contemplated job duties[.]” To determine if there is an implied promise, the court must analyze the circumstances surrounding the employee’s employment and determine whether those circumstances “necessarily involved the provision of confidential information to” the employee “before [the employee] could perform the work [the employee] was hired to do[.]”⁵¹

It makes sense that where an employee cannot do a job without confidential information, such as was the case in *Mann Frankfort*, and an employer hires an employee conditioned on the employee’s promise not to use confidential information against the employer, there is an implied promise to supply confidential information. But that same assumption does not hold true where the employee does not theoretically need confidential information to do his or her job. In that circumstance, the employer could merely want a promise from the employee to not use confidential information if the employee ever comes into contact with it. The employer is not actually promising to provide confidential information; the promise is merely an attempt to protect the employer in the event it later decides to provide the employee with confidential information. Therefore, absent proof that the employee could not perform his employment with confidential information, there is no factual mooring to which the employer could tie an implied promise.

B. *Merger Clause Can Bar Implied Promise*

Even if there is evidence that an employee could not, at any point, perform his or her job without confidential information, there can be no implied promise to provide confidential information where the parties expressly state so in their agreement. For example, the agreement could provide in a merger clause:

This letter constitutes the entire Agreement between the parties hereto and cancels and supersedes, as of the date hereof, any and all other previous agreements between the parties as to the subject matter of this Agreement and *there are no terms expressed or implied other than the expressed terms of this Agreement*. No change, modification, or termination or amendment of this Agreement shall be valid unless it is in writing and signed by both parties.

51. *EMS USA, Inc.*, 309 S.W.3d at 659 (citations omitted).

If properly pled,⁵² the issue is whether the trial court could find an implied promise to provide confidential information where the agreement expressly states that there can be no implied promises. Implied covenants are not favored in Texas law. Courts may imply certain duties and obligations only when there is a satisfactory basis in the express contracts of the parties that makes it necessary to imply those duties and obligations in order to effect the purposes of the parties; courts must be cautious in exercising this power to imply provisions.⁵³

Importantly, courts in construing contracts cannot, by implication, find terms in opposition to the express language that the parties themselves have written into the contracts.⁵⁴ Similarly, it is axiomatic that courts should not imply promises to a contract where the parties themselves have expressly stated in the agreement that their written agreement is the entire agreement and that there are no implied promises. In *Hallmark v. Port/Cooper-T. Smith Stevedoring Co.*, a former employee sued her former employer for wrongful termination in breach of her employment agreement.⁵⁵ The employment agreement contained an integration provision stating that the employment agreement was the “entire agreement” between the parties. Her former employee argued that a partner of the employer ostensibly owed her a fiduciary duty that created an implied covenant of good faith and fair dealing and imposed an implied requirement to terminate her only for good cause.⁵⁶ The court refused to add the additional requirements into the employment agreement because “[t]o do so would require us to add extrinsic factors to an otherwise unambiguous agreement.”⁵⁷

Other courts around the United States have similarly refused to imply obligations to contracts with such provisions.⁵⁸ Interestingly, even

52. Generally, courts do not consider implied promises unless they are specifically pled. See *Universal Health Servs., Inc. v. Renaissance Women's Grp., P.A.*, 121 S.W.3d 742, 748 (Tex. 2003); *Nalle v. Taco Bell Corp.*, 914 S.W.2d 685, 687 n.2 (Tex. App.—Austin 1996, writ denied).

53. See *Universal Health Servs.*, 121 S.W.3d at 747–48; *Bank One, Texas, N.A. v. Stewart*, 967 S.W.2d 419, 441 (Tex. App.—Houston [14th Dist.] 1998, pet. denied); *Lynx Exploration & Prod. Co., Inc. v. 4-Sight Operating Co., Inc.*, 891 S.W.2d 785, 788 (Tex. App.—Texarkana 1995, writ denied).

54. See *Dall. Power & Light Co. v. Cleghorn*, 623 S.W.2d 310, 311 (Tex. 1981).

55. *Hallmark v. Port/Cooper-T. Smith Stevedoring Co.*, 907 S.W.2d 586, 589 (Tex. App.—Corpus Christi 1995, no writ).

56. *Id.* at 592.

57. *Id.*

58. See, e.g., *Trueposition Inc. v. Andrew Corp.*, 568 F. Supp. 2d 500, 523 (D. Del. 2008) (finding no implied license claim where settlement agreement contained integration clause); *Permanence Corp. v. Kennametal, Inc.*, 725 F. Supp. 907, 911–12 (E.D. Mich. 1989) (refusing to imply a term for patent licensee to use “best efforts” where it was not expressed in the agreement in part because parties’ agreement contained an integration provision stating it was the entire agreement between the parties); *Glassmere Fuel Serv., Inc. v. Clear*, 900 A.2d 398, 403 (Pa. Super. Ct. 2006) (refusing to imply a term into a supply agreement for the financing of the conversion of convenience store where parties’ agreement contained an integration provision

2012] *THE MERGER CLAUSE: A POTENTIAL DEFENSE* 739

in criminal cases, where a person's liberty is at stake, a merger clause in a plea agreement bars any other oral or implied promises or agreements.⁵⁹ To come full circle, the reason that a merger clause bars any such implied agreements is that courts look to civil contract law in interpreting plea agreements.⁶⁰ As one court noted: "Fundamental contract principles establish that the written plea bargain was 'adopted by the parties as a complete and exclusive statement of the terms of the agreement.' As a fully integrated agreement, the described exchange may not be supplemented with unmentioned terms."⁶¹

Therefore, a court should not imply a promise to provide confidential information where such an implied promise would be contradictory to the parties' express agreement that neither party would be able to raise an implied promise accusation. Interestingly, the agreement in the *Mann Frankfort* case had a merger clause.⁶² But the parties to that case never raised the merger clause in their briefing to the Texas Supreme Court, and the Court never mentioned any such clause in its opinion.⁶³ Certainly, the employer did not mention the fact that the agreement contained a merger clause that precluded implied promises. The employee in *Mann Frankfort* also did not raise the merger clause in its briefing.⁶⁴ In fact, the employee only spent three pages discussing enforceability and seemed to take for granted that, consistent with prior court of appeals' precedent, the Supreme Court

stating that it was the entire agreement between the parties and that any promise not incorporated therein would not be binding on either party); *Young Living Essential Oils, LC v. Marin*, No. 20080624-CA, 2009 WL 3042385, at *2 (Utah Ct. App. Sept. 24, 2009) (mem. op.) (refusing to imply requirement that defendant provide marketing tools to plaintiff in contract where same was not part of written agreement and contract contained integration clause stating it was entire agreement between parties and that there were no representations or other agreements except expressly set forth therein).

59. *See, e.g., United States v. Ahn*, 231 F.3d 26, 36 (D.C. Cir. 2000); *United States v. Hunt*, 205 F.3d 931, 935 (6th Cir. 2000) (holding that a merger clause "normally prevents a criminal defendant, who has entered into a plea agreement, from asserting that the government made oral promises to him not contained in the plea agreement itself"); *United States v. Alegria*, 192 F.3d 179, 185 (1st Cir. 1999) ("Where, as here, an unambiguous plea agreement contains an unqualified integration clause, it normally should be enforced according to its tenor."); *United States v. Doyle*, 981 F.2d 591, 594 n.3 (1st Cir. 1992) (explaining that this rule "has particular applicability when, as in this case, the plea agreement itself specifically states that 'there are no further or other agreements, either express or implied,' other than those explicitly set forth in the document"); *United States v. Fentress*, 792 F.2d 461, 464 (4th Cir. 1986).

60. *Fentress*, 792 F.2d at 464 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 210 (1981)).

61. *Id.*

62. *Hardy v. Mann Frankfort Stein & Lipp Advisors, Inc.*, 263 S.W.3d 232, 245-46 (Tex. App.—Houston [1st Dist.] 2007), *rev'd*, *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844 (Tex. 2009).

63. *See Fielding*, 289 S.W.3d at 844.

64. Resp't's Brief on the Merits, *Mann Frankfort Stein & Lipp Advisors, Inc.*, 289 S.W.3d 844 (No. 07-0490).

would not find that an implied promise could be sufficient to create an “otherwise enforceable agreement.”⁶⁵ In its opinion, the Texas Supreme Court certainly never discussed the impact of the merger clause and never held that a trial court could disregard such a clause and rewrite the parties’ agreement to add a promise to provide confidential information.

C. Public Policy Supports No Implied Promise Where Merger Clause Exists

The fact that the employer, who drafted the contract at issue, is stuck with its own bargain and may not attempt to vary it by “implied” promises is entirely fair and supported by public policy and general contract precedent. “In Texas, a writing is generally construed most strictly against its author.”⁶⁶ The very purpose of putting an agreement in writing is to settle its terms with finality and to exclude all other understandings to the contrary.⁶⁷ This is necessarily the law; otherwise a party could destroy the value of a written contract by mere proof of contemporaneous parol agreements.⁶⁸ Parties make their own contracts, and it is not within the province of the courts to vary contractual terms in order to protect parties from the consequences of their own oversights and failures in nonobservance of obligations assumed.⁶⁹ The courts are not at liberty to redraft the terms of a contract while professing to construe it.⁷⁰

In construing contracts, courts cannot, by implication, find terms in opposition to the express language that the parties themselves have written into their contracts.⁷¹ Parties to a contract are masters of their own choices.⁷² “They are entitled to select what terms and provisions to include in a contract before executing it. And, in so choosing, each is entitled to rely upon the words selected to demarcate their respective obligations and rights.”⁷³ In short, the parties strike the deal they choose to strike and, thus, voluntarily bind themselves in the manner

65. *Id.* at 850.

66. *Temple-Eastex, Inc. v. Addison Bank*, 672 S.W.2d 793, 798 (Tex. 1984).

67. *Santos v. Mid-Continent Refrigerator Co.*, 469 S.W.2d 24, 27 (Tex. Civ. App.—Corpus Christi 1971, writ ref’d n.r.e.) (quoting *Supercold Southwest Co. v. Elkins*, 166 S.W.2d 97 (Tex. 1942)).

68. *Id.*

69. *Provident Fire Ins. Co. v. Ashy*, 162 S.W.2d 684, 687 (Tex. 1942) (citing *Dorroh-Kelly Mercantile Co. v. Orient Ins. Co.*, 135 S.W. 1165, 1167 (Tex. 1942)).

70. *Fein v. R.P.H., Inc.*, 68 S.W.3d 260, 267 (Tex. App.—Houston [14th Dist.] 2002, pet. denied); *see also Ashcraft v. Lookadoo*, 952 S.W.2d 907, 911 (Tex. App.—Dallas 1997, pet. denied).

71. *Dall. Power & Light Co. v. Cleghorn*, 623 S.W.2d 310, 311 (Tex. 1981).

72. *Cross Timbers Oil Co. v. Exxon Corp.*, 22 S.W.3d 24, 26 (Tex. App.—Amarillo 2000, no pet.).

73. *Id.*

they choose.⁷⁴ A court cannot change the parties' agreement merely because it does not like it or because one of the parties subsequently finds it distasteful.⁷⁵ Otherwise, such judicial activism would undermine not only the sanctity afforded the contract but also the expectations of those who created and relied upon it.⁷⁶

D. *The Public Policy of Freedom of Contract Supports the Enforcement of a Merger Clause in Derogation of an Implied Promise*

The court would be rewriting and striking out an important term of the parties' contract if it were to use an "implied" promise to provide confidential information and doing so would violate the public policy of freedom of contract. Public policy strongly supports the enforcement of unambiguous contract language as written and the freedom of parties to contract. The freedom to contract is one of the founding principles of our legal system.⁷⁷ The freedom of contract is so important in Texas that it is expressly included in Texas's Constitution.⁷⁸ The Texas Supreme Court has consistently recognized Texas's strong public policy in favor of preserving the freedom of contract.⁷⁹ The Court has recently noted Texas's paramount public policy that contracts shall be held sacred and shall be enforced:

[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.⁸⁰

Furthermore, "much of the 'law of contracts' has nothing whatever to do with what the parties contemplated but consists of rules—founded on considerations of public policy—by which the courts impose on the contracting parties obligations of which the parties were often unaware."⁸¹ The enforcement of the plain meaning of a contract is such a public policy rule.

74. *Fein*, 68 S.W.3d at 267 (quoting *Cross Timbers*, 22 S.W.3d at 26) (emphasis omitted).

75. *Id.* at 267–68.

76. *See id.*

77. *See Churchill Forge, Inc. v. Brown*, 61 S.W.3d 368, 370 (Tex. 2001); *Wood Motor Co. v. Nebel*, 238 S.W.2d 181, 185 (Tex. 1951).

78. TEX. CONST. art. I, § 16 ("No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.").

79. *See Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 664 (Tex. 2008); *Churchill Forge, Inc.*, 61 S.W.3d at 371; *Wood Motor Co.*, 238 S.W.2d at 185.

80. *Fairfield*, 246 S.W.3d at 664.

81. 11 SAMUEL WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS* § 31:4 (4th ed. 1999).

As expressed in the agreement's merger clause, the parties contemplated that neither one of them would be able to argue that the other made an implied promise, and therefore they are both stuck exclusively with the express terms of the agreement. Otherwise, a trial court would be improperly ignoring the merger clause that expressly stated that there were no implied promises. A court should give effect to all provisions of a contract so that none will be rendered meaningless.⁸² Courts must interpret a contract so that each part has some consequence.⁸³ And "the parties to an instrument intend every clause to have some effect."⁸⁴ A court should not ignore the merger clause, write it out of the parties' contract, and "imply" a promise to provide confidential information by the former employer that is not contained in agreement.

IV. CONCLUSION

Generally, an employee has a right to work where he or she pleases and in the field that he or she chooses. An at-will employee may properly plan to compete with her employer and take active steps to do so while still employed. Absent special circumstances, once an employee resigns, she has a constitutional right to actively compete with her former employer. Where a former employer attempts to overcome this public policy by a contractual covenant not to compete, it must meet the standards of § 15.50(a) and prove that the covenant is ancillary to an otherwise enforceable agreement. Where the employer solely relies on an alleged ancillary agreement to provide confidential information and a reciprocal agreement from the employee to not use that information improperly, the employer must prove both sides of that agreement. Where an agreement does not include a promise by the employer to provide any confidential information to the employee and where the parties expressly provide that there can be no implied promises, it would seem self-evident that there is no otherwise enforceable agreement to which the covenant could be ancillary. In that circumstance, the covenant would be void and against public policy in Texas, and any breach of contract claim based thereon would be meritless.

82. See *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983).

83. *Id.* at 394.

84. *Westwind Exploration, Inc. v. Homestate Sav. Ass'n*, 696 S.W.2d 378, 382 (Tex. 1985).